

Drug Testing In The Workplace: Issues For The Arbitrator

I. INTRODUCTION

In recent years, the subject of drug use testing in the workplace has increasingly become a difficult and highly explosive issue.¹ The number of employers that test their employees for drug abuse² has grown tremendously as businesses have begun to appreciate the enormity of the drug problem.³ Indeed, the costs to industry in terms of lost productivity, increased medical expenses, risk of on-the-job injuries and property damage are staggering.⁴ It is not surprising, therefore, that companies have turned to drug testing; it may be the most effective means of combatting substance abuse in the workplace.⁵ Nevertheless,

1. The profusion of scholarly literature on drug testing attests to the controversy that surrounds this issue. A sampling of the commentaries dealing with drug testing in the workplace includes: Cross & Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 517 (1987); Hartstein, *Drug Testing in the Workplace: A Primer for Employers*, 12 EMPLOYEE REL. L.J. 577 (1987); Note, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453 (1987); Aron, *Drug Testing: The Employer's Dilemma*, 38 LAB. L.J. 157 (1987); Denenberg & Denenberg, *Employee Drug Testing and the Arbitrator: What Are the Issues?*, Arb. J., June 1987, at 19. See also *Testing for Drug Use in the American Workplace: A Symposium*, 11 NOVA L. REV. 291 (1987).

2. Today nearly one half of all Fortune 500 companies have testing programs of some kind. Cox, *Workers Win One on Drug Tests*, Nat'l L.J., Feb. 29, 1988, at 3. See also Pust, *Drug Testing: The Legal Dilemma*, ABA L.J., Nov. 1, 1986, at 51. According to an April 1988 Gallup survey, nearly one-third of American companies with over 5,000 employees have a drug testing program. What is more, many companies without such programs plan to implement them in the future. Empl. Coordinator (Research Inst. Am.) PM-14,727.

3. It is estimated that Americans consume 60% of the world's production of illegal drugs. Taylor, *America on Drugs*, U.S. NEWS & WORLD REP., July 28, 1986 at 48. Presently 22 million Americans use marijuana regularly, and an estimated 15 million use cocaine. Susser, *Legal Issues Raised By Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (1985). In 1986, it was estimated that between 5 and 13% of the U.S. workforce abuses drugs other than alcohol, and numerous studies have shown that drug abuse means up to three times as many job-related accidents and 10 or more times as many sick days. Casto, *Battling Drugs on the Job*, TIME, Jan. 27, 1986, at 43.

4. A study conducted by the Research Triangle Institute of North Carolina revealed that drug and alcohol abuse costs the American economy \$99 billion annually. BUREAU OF NAT'L AFF., ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES 8 (1986). This same study found that abuse of illegal drugs cost the U.S. \$60 billion in 1983. Casto, *supra* note 3, at 43. The impact of drug abuse on the job was highlighted in a recent study by the Firestone Tire & Rubber Co. The study found drug users four times more likely than non-users to be involved in a plant accident. Lips & Lueder, *An Employer's Right to Test for Substance Abuse, Infectious Diseases, and Truthfulness Versus An Employee's Right to Privacy*, 39 LAB. L.J. 528, 529 (1988). See also Chief Federal Drug Enforcer Says Abuse Costs U.S. Companies Billions, 33 Daily Lab. R. A-1 (Feb. 19, 1988).

5. Cross & Haney, *supra* note 1, at 656. Advocates of employee drug testing often point to the success of the military in using drug testing to eradicate drug abuse. See

drug testing is not a trouble-free panacea. Testing raises important issues regarding, among other things, the privacy of those tested and the accuracy of the tests themselves. Consequently, many workers have resisted the efforts of employers to implement testing.

Employees have challenged testing programs on a variety of grounds. Workers in the public sector have sought refuge in protections guaranteed by the United States Constitution.⁶ Such protections, however, are generally inapplicable to employees in the private sector because testing by private employers does not constitute state action.⁷ In the absence of state action, workers have still sought to block testing by relying upon state constitutional provisions,⁸ state statutes and municipal ordinances, and common law causes of action.⁹

Additional resistance to testing has come from organized labor.¹⁰ Employers whose employees are represented by a labor union may face certain restrictions on their ability to conduct drug testing. The union, for example, can challenge drug testing programs by arguing that testing violates the collective bargaining agreement or that unilateral implementation of a testing program constitutes an unfair labor practice under the National Labor Relations Act.¹¹ In either case, arbitrators will likely

Rust, *supra* note 2, at 51. One author notes that drug testing in the military cut drug use from 27% to 5% between 1982 and 1985. Melloan, A Drug-Test Advocate Makes No Apologies, Wall St. J. July 19, 1988, at 29, col. 3.

6. Most of the constitutional challenges are based upon the fourth amendment's prohibition against unreasonable search and seizure. U.S. CONST. amend. IV. See generally Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605 (1987); Bible, *Employee Urine Testing and the Fourth Amendment*, 38 LAB. L.J. 611 (1987). See also *Scmerber v. California*, 384 U.S. 757 (1966) (testing of blood constitutes a search). Cf. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986) (drug test is not an unreasonable search and seizure when conducted in an intensely regulated industry [horse racing]).

7. *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982). The protection afforded by the fourth amendment is substantial, though the courts are not in agreement on the limits to that protection. See generally Joseph, *supra* note 6.

8. California, for example, has a constitutional right to privacy which has been instrumental in striking down employer testing programs. See Palefsky, *Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance*, 11 NOVA L. REV. 669 (1987); Cross & Haney, *supra* note 1, at 518-20, 525. Employers should also be aware of state handicap laws and decisions which declare alcohol and drug addiction to be a protected handicap and hence employers must "reasonably accommodate" these employees. Lips & Lueder, *supra* note 4, at 532.

9. Palefsky, *supra* note 8, at 669; Cross & Haney, *supra* note 1, at 525-29; Note, *Statutory and Other Limitations to Drug Testing*, 23 WILLAMETTE L. REV. 573 (1987). Possible causes of action include: invasion of privacy; intentional infliction of emotional distress, assault and battery; false arrest or imprisonment; negligence; wrongful discharge; and defamation. See Cross & Haney, *supra* note 1, at 521-23, 525-32; Aron, *supra* note 1, at 165.

10. Morikawa, Hurtgen, Conner & Costello, *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA L. REV. 653, 654 (1987) [hereinafter Morikawa]; Melloan, *supra* note 5. See also K. ZEESE, DRUG TESTING LEGAL MANUAL §4.02 (1988).

11. 29 U.S.C. §§ 151-187 (1985); see R. GORMAN, BASIC TEXT ON LABOR LAW 496-98 (1976).

decide disputes that arise over drug use testing. Most collective bargaining agreements require that disputes be submitted to a neutral arbitrator,¹² and the National Labor Relations Board has a longstanding policy of deferring some unfair labor practice charges to arbitration.¹³ Given that nearly twenty percent of the nation's workforce is unionized,¹⁴ arbitration will play a substantial role in delineating the boundaries of permissible drug abuse testing.

This Note will examine the key issues which arbitrators will face in resolving private sector testing disputes in the unionized workplace. Special focus will be given to the criteria by which arbitrators have judged testing programs. Although employers in the private sector have broad leeway in implementing testing, a review of recent arbitration awards demonstrates that the right to test unionized workers is not completely unfettered. This Note concludes that the ability of arbitration to accommodate the interests of both labor and management can make it a useful tool in resolving disputes over testing in the workplace. Still, the use of arbitration in resolving drug testing disputes has its drawbacks; chief among them is the lack of unanimity among arbitrators on key testing issues. This schism in arbitral authority is natural, however, given the novel and controversial nature of workplace testing disputes.

II. TESTING UNDER THE COLLECTIVE BARGAINING AGREEMENT

Generally, labor unions have challenged drug testing on two grounds. First, in situations where the collective bargaining agreement does not cover the issue of drug testing, unions have argued that management may not test workers without first bargaining with the union. In such instances, unions have maintained that "unilateral implementation" of a drug testing program not only violates the collective bargaining agreement but also constitutes an unfair labor practice under the National Labor Relations Act. This argument will be addressed later in this Note.¹⁵ A second and more frequent challenge arises in situations where the collective bargaining agreement addresses the subject of drug testing. In such instances, the issue is not whether the employer can test at all, but rather, how much freedom the collective bargaining agreement gives the employer in testing its employees for drugs.

12. R. GORMAN, *supra* note 11, at 496-98.

13. *Id.*

14. Imwinkelried, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing*, 11 NOVA L. REV. 563, 577 (1987).

15. See *infra* text accompanying notes 93-117.

A private employer's ability to control a unionized workforce can be limited by the terms of a collective bargaining agreement.¹⁶ The terms of such an agreement can affect both the right to implement testing, the manner of testing, and the disciplinary alternatives open to employers.¹⁷ Challenges to employee drug testing programs based upon the terms of the collective bargaining agreement can arise when a union files a grievance stating that management has exceeded the scope of testing allowed by the agreement.¹⁸ More often, however, arbitration cases will involve grievances challenging disciplinary actions taken by an employer against an employee who has tested positive for drug use.¹⁹ In deciding such grievances, arbitrators will have to decide whether the employer had "just cause" for invoking disciplinary sanctions.²⁰ The union may argue, for example, that management lacked "just cause" because the testing procedures were defective or improperly administered.²¹ Where testing procedures are challenged, the outcome of the "just cause" determination will likely hinge upon several considerations.

One of the more important of these considerations is whether or not the employer had "probable" or "reasonable cause" to test a worker.²² If there is no provision in the collective bargaining agreement specifically calling for random or regular testing, many arbitrators will require that the employer have some degree of individualized suspicion before an employee can be tested.²³ Often, this means that the employer must demonstrate that the employee's behavior indicated drug use.

In *Gem City Chemicals, Inc. v. International Brotherhood of Teamsters, Local 957*,²⁴ Arbitrator Warns found that an employer lacked "reasonable cause" for requiring an employee to submit to testing, and hence lacked "just cause" for discharging him. The arbitrator noted that there had been no evidence that the grievant's "behavior had been unusual, unsafe, uncoordinated, or in any way arousing suspicion that he was unable to handle his job because of intoxication or addiction." The arbitrator added: "There was nothing in [grievant's] job performance to give cause to Management to insist that he must take a drug screen."²⁵

16. R. GORMAN, *supra* note 11, at 541-42; Note, *supra* note 9, at 584.

17. See generally Morikawa, *supra* note 10.

18. *Id.* at 664; Cross & Haney, *supra* note 1, at 524.

19. K. ZEESE, *supra* note 10, at § 4.02[1][c].

20. Susser, *supra* note 3, at 48. Even if the collective bargaining agreement does not contain a "just cause" provision, many arbitrators will find such a provision to be implicit in the contract. See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS*, 650-53 (4th ed. 1985).

21. See generally Denenberg & Denenberg, *supra* note 1; Morikawa, *supra* note 10.

22. See M. HILL & A. SINICROPI, *MANAGEMENT RIGHTS: A LEGAL AND ARBITRAL ANALYSIS* 179-81 (1986).

23. Denenberg & Denenberg, *supra* note 1, at 21.

24. 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).

25. *Id.* at 1024-25. See also *Georgia Pacific Corp. v. United Paperworkers Int'l*, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (1985) (Clarke, Arb.) (termination was improper where grievant was involved in company accident but did not manifest abnormal behavior).

Reasonable cause was also lacking in *Southern California Gas Co. v. United Utility Workers of America, Local 132*,²⁶ where the employer tested a worker after receiving an anonymous tip that the employee, a meter-reader, was smoking marijuana on the job. After noting that the worker's demeanor did not justify having to take the drug test, the arbitrator wrote: "In the industrial setting, proper cause to test for drugs requires something more than an anonymous telephone call. A drug test is too intrusive an invasion of privacy to be conducted on the basis of an anonymous call."²⁷ According to this arbitrator, the employer needed more proof of on-the-job use before it could require the employee to take a drug test.

On the other hand, discipline based upon testing results will usually be upheld where the employee's behavior was sufficiently unusual to warrant an inference that he or she was under the influence of drugs.²⁸ Such was the case in *Roadway Express, Inc. v. International Brotherhood of Teamsters, Local 705*,²⁹ where a truck driver's erratic and suspicious behavior prompted his supervisor to order him to undergo a drug screening test. Arbitrator Cooper found that the supervisor had reasonable cause and that it would have been unreasonable to require absolute proof of the employee's impairment before the test could be given. Similarly, in *Union Plaza Hotel v. Culinary Workers Union Local 226*,³⁰ a restaurant supervisor had reasonable cause to test a female busperson who, among other things, was observed dancing around the dining area.³¹ Finally, in *Regional Transportation District v. Amalgamated Transit Union, Local 1001*,³² Arbitrator Goldstein found that an employer had reasonable cause to test a bus driver where she exhibited four instances of suspicious behavior, including a minor traffic accident. This decision demonstrates that while separate incidents may be insufficient to establish reasonable cause, the totality of circumstances may justify a demand for testing.³³

Although lack of reasonable cause is a frequently cited reason among arbitrators for overturning disciplinary actions, a review of arbitral

26. 89 Lab. Arb. (BNA) 393 (1987) (Alleyne, Arb.).

27. *Id.* at 396.

28. *American Standard v. International Bhd. of Teamsters, Local 651*, 82-1 Lab. Arb. Awards (CCH) ¶ 8090 (1981) (Katz, Arb.). In *American Standard*, the arbitrator concluded: "[S]ince the evidence establishes that grievant was unsteady, staggering, swaying, and disoriented; that her eyes were glassy and her speech slurred, it was reasonable for the company to conclude that she was under the influence of drugs." *Id.* at 3430.

29. 86-2 Lab. Arb. Awards (CCH) ¶ 8467 (1986) (Cooper, Arb.).

30. 87-1 Lab. Arb. Awards (CCH) ¶ 8070 (1986) (McKay, Arb.).

31. *Id.* See also *Metropolitan Transit Authority, Houston v. Trans. Workers Union of Am., Local 260*, 89 Lab. Arb. (BNA) 129 (1987) (Baroni, Arb.) (bus driver observed exhibiting "awkward head movements," slurred speech and red eyes).

32. 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.).

33. *Id.* at 218.

authority indicates that the standard for determining whether or not an employer had reasonable cause is not a strict one. Indeed, one arbitrator observed:

Arbitrators are not requiring employers to have sufficient evidence to support a criminal indictment before they compel an employee to undergo a drug test. Nor do they seek evidence beyond a reasonable doubt. They do not even look for a preponderance of the evidence to show that the employee is guilty of the charge against him. All they want to know is that the employer has some rational grounds for testing the employee³⁴

In addition to abnormal behavior or appearance, arbitrators in several cases have found that the employer had probable cause because an employee had a history of drug problems.³⁵ In *Sanford Corp. v. International Brotherhood of Teamsters, Local 743*,³⁶ for example, a worker was tested after sustaining a back injury. Although the worker did not exhibit signs of drug use, Arbitrator Wies held that the employer had cause to test because the employee had admitted on several occasions that he had used drugs and because the employer was aware that the worker had been hospitalized at one time for acute alcoholic intoxication. The arbitrator concluded that this information "gave the Company knowledge of the facts which created a serious and dangerous risk factor to himself and other employees. This was sufficient cause for the Employer to exercise reasonable precautions in requesting the drug test."³⁷

Just as knowledge of prior drug use may constitute reasonable cause, so too may history of drug abuse among workers in a given company. Hence, in *Marathon Petroleum Co. v. Oil, Chemical and Atomic Workers International Union, Local 4-449*,³⁸ Arbitrator Grimes found that reasonable cause existed where an oil refinery was aware of drug abuse among employees of neighboring plants and in its own plant.³⁹ The arbitrator also found reasonable cause because of the dangerous nature of the products handled by the employees. In fact, the arbitrator hinted

34. *Warehouse Distribution Centers v. Teamsters, Local 598*, 90 Lab. Arb. (BNA) 979, 983 (Weiss, Arb.).

35. See *American Standard v. International Bhd. of Teamsters, Local 651*, 82-1 Lab. Arb. Awards (CCH) ¶ 8090 (1981) (Katz, Arb.); *Sanford Corp. v. International Bhd. of Teamsters, Local 743*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.); *South Carolina Elec. & Gas Co. v. Amalgamated Transit Union, Local 1337*, 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.); *Deaconess Medical Center v. Montana Nurses' Ass'n, Billings Deaconess Hosp., Local Unit, 87-1 Lab. Arb. Awards (CCH) ¶ 8085* (1986) (Robinson, Arb.).

36. 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.).

37. *Id.* at 972.

38. 89 Lab. Arb. (BNA) 716 (1987) (Grimes, Arb.).

39. *Id.* at 722-23. Cf. *Gem City Chemicals, Inc. v. International Bhd. of Teamsters, Local 957*, 86 Lab. Arb. (BNA) 1023, 1024 (1986) (Warns, Arb.) (company failed to show that it had been "menaced" by a drug problem in the past).

that if the grievant were in a less hazardous occupation, the result would have been different.⁴⁰

This aspect of *Marathon Oil* points out another important factor for arbitrators to consider in drug testing cases; that is, the degree of danger involved in the grievant's occupation. Reasonable cause will be more likely found where the employee is engaged in work that is highly dangerous or work that presents a possible threat to public safety.⁴¹ In *Bowman Transportation, Inc. v. United Steel Workers of America, Local 13600*,⁴² for example, Arbitrator Duff found an employer's legitimate concern for safety to require a grievant, who had previously tested positive, to demonstrate that he was drug-free before being reinstated. The arbitrator noted:

When these factors [the effects of marijuana use on safety] are coupled with the fact that Grievant's trucking job presents enormous potential for harm to others, it is clear that the Company at least had good cause to take some reasonable measures to assure that [grievant] was drug-free before he returned to work.⁴³

An important consideration that is related to the issue of reasonable cause is whether or not the employee received adequate notice of the company's plan to implement testing.⁴⁴ In *Gem City Chemicals, Inc. v. International Brotherhood of Teamsters, Local 957*,⁴⁵ an arbitrator found that although the collective bargaining agreement called for periodic physical examinations, the company failed to give its workers notice of drug testing, and thus, a grievant who tested positive was improperly discharged. The arbitrator wrote:

There is, however, no published rule that employees will be tested as a group or randomly There was no indication as to the contemplated disposition of those individuals who tested positive without associated de-

40. *Marathon Petroleum Co. v. Oil, Chem. and Atomic Workers Int'l Union, Local 4-449*, 89 Lab. Arb. (BNA) 716, 722-23 (1987) (Grimes, Arb.).

41. *See South Carolina Elec. & Gas Co. v. Amalgamated Transit Union, Local 1337*, 89 Lab. Arb. (BNA) 845 (1987) (bus driver); *Metropolitan Transit Auth., Houston v. Trans. Workers Union of Am.*, Local 260, 89 Lab. Arb. (BNA) 129 (1987) (Baroni, Arb.) (bus driver); *Deaconess Medical Center v. Montana Nurses' Ass'n, Billings Deaconess Hosp.*, Local Unit, 87-1 Lab. Arb. Awards (CCH) ¶ 8085 (1986) (Robinson, Arb.) (nurse). It should also be noted that reasonable cause will probably be found where the employee has actually been involved in an accident. *See, e.g., Regional Transp. Dist. v. Amalgamated Transit Union, Local 1001*, 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.); *cf. Georgia-Pacific Corp. v. United Paperworkers Int'l Union, Local 335*, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (1985) (Clarke, Arb.) (reasonable cause was questioned even though the worker was involved in an accident).

42. 90 Lab. Arb. (BNA) 347 (1987) (Duff, Arb.).

43. *Id.* at 350.

44. Susser, *supra* note 3, at 47; Geidt, *Drugs and Alcohol in the Work Place: Balancing Employer and Employee Rights*, 11 EMPLOYEE REL. L.J. 181, 195 (1985).

45. 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).

terioration in performance. There was no prior notice to the Union or the employees that the physical examination would include a drug screen.⁴⁶

In *American Standard v. International Brotherhood of Teamsters, Local 651*,⁴⁷ however, Arbitrator Katz found that contract language requiring workers to submit to a physical examination "at anytime" was sufficient notice to employees, and thus the company could test the grievant without prior announcement.⁴⁸ Similarly, in *Deaconess Medical Center v. Montana Nurses Association, Billings Deaconess Hospital, Local Unit*,⁴⁹ Arbitrator Robinson found that a clause conferring the employer's right to "maintain efficiency of employees" was sufficient to allow drug testing without prior announcement.⁵⁰ Still, from an employers perspective, it would be wise if testing policies were clearly spelled out so that workers have notice.

Although testing policies are announced and explained, and workers have notice, these policies may be enforced inconsistently. In some arbitration cases, discipline has been overturned because the rules were disparately enforced.⁵¹ Unions may argue that testing under a particular program is arbitrary, discriminatory, or even retaliatory. A special concern to arbitrators is whether an employee has been disciplined for union activities. Some employees have challenged their dismissals for drug use on these grounds, but few have been successful.⁵²

Ironically, charges of harassment will most likely occur under programs which are the most reasonable. That is, charges of retaliatory

46. *Id.* at 1024. See also *Donaldson Mining Co. v. United Mine Workers of Am.*, 91 Lab. Arb. (BNA) 471, 476 (1988) (Zobrak, Arb.) ("In the absence of a clearly stated, published, and communicated policy, this arbitrator is foreclosed on making any judgement on the reasonableness of the drug testing policy employed by the Company. . . . This verbal policy, unwritten and unpublished, simply does not rise to the level of a policy that can bind employees.").

47. 82-1 Lab. Arb. Awards (CCH) ¶ 8090, 3429 (1981) (Katz, Arb.). (Additionally, the arbitrator rejected grievant's argument that she did not have notice that she could be fired for refusing to submit to testing. The arbitrator found that other workers had been discharged in the past for refusing to take the test and because drug and testing rules were posted throughout the workplace and employees received copies of these rules).

48. *Id.* See also Morikawa, *supra* note 10, at 664 n.39.

49. 87-1 Lab. Arb. Awards (CCH) ¶ 8085 (1986) (Robinson, Arb.).

50. *Id.* See also *Boise Cascade Corp. v. United Bhd. of Carpenters, Local 3094*, 90 Lab. Arb. (BNA) 105 (1987) (Hart, Arb.) (testing permissible despite employee's refusal to consent where employee knew of company policy requiring drug test of employees involved in on-the-job accidents).

51. Geidt, *supra* note 44, at 195; Denenberg & Denenberg, *supra* note 1, at 20-21. See *Southern Cal. Gas Co. v. Utility Workers Union of Am.*, Local 132, 89 Lab. Arb. (BNA) 393, 397 (1987) (Alleyne, Arb.) (discharge for positive test result found improper, in part, because company deviated from policy of permitting union shop steward to be present before employees are tested).

52. See Geidt, *supra* note 44, at 195. See, e.g., *American Standard v. International Bhd. of Teamsters, Local 651*, 82-1 Lab. Arb. Awards (CCH) ¶ 8090, 3430 (1981) (Katz, Arb.).

testing are likely to occur in programs in which the employer is limited to reasonable cause testing. The possibility for retaliatory testing is greatest under these programs because, in contrast to random testing programs, they give the employer broad discretion over whom to test. In fact, management may be inclined to defend random testing upon the basis that it eliminates the opportunity for harassment.⁵³

In determining whether an employer acted properly in discharging or suspending an employee, arbitrators may also consider whether the testing procedures were reasonable.⁵⁴ Several arbitration cases demonstrate that testing procedures which unnecessarily infringe upon the employee's privacy rights may result in reinstatement. Thus, employers should exercise prudence in selecting the company that will administer the tests and the testing method to be employed.⁵⁵ Additionally, if testing is by urinalysis, employers must decide whether employees will be observed while furnishing their specimens. This has been a highly controversial aspect of the drug testing debate, both within and without the realm of arbitration.⁵⁶

In *Union Plaza Hotel v. Culinary Workers Union, Local 226*,⁵⁷ for example, the grievant refused to provide a urine specimen when to do so would have required her to undress and urinate while under the observation of a nurse. Although the arbitrator recognized the validity of the employer's desire to ensure the authenticity of the specimen,⁵⁸ he nonetheless found observation unnecessary because the circumstances surrounding the test made it unlikely that the grievant could have diluted or substituted her urine. More importantly, the arbitrator found that the employer failed to accede to the grievant's reasonable requests which could have ameliorated the embarrassment caused by the test.⁵⁹

53. See Denenberg & Denenberg, *supra* note 1, at 20-21.

54. Many arbitrators require that an employer's work rule against drug use be reasonable on its face. Cross & Haney, *supra* note 1, at 533 n.104.

55. Some companies may contract for testing with testing laboratories or hospitals, or they may simply do it themselves. Testing can be done by blood testing, urinalysis, or breathalyzer. In *Bay Area Rapid Transit Dist. v. Amalgamated Transit Union, Div. 1555*, the arbitrator held that the use of one testing method over less intrusive methods does not make testing unreasonable. 87-1 Lab. Arb. Awards (CCH) ¶ 8084 (1986) (Concepcion, Arb.). "However, where a variety of testing is available, dictating the method used is unreasonable." *Id.* at 3344.

56. See Joseph, *supra* note 6, at 605.

57. 87-1 Lab. Arb. Awards (CCH) ¶ 8072 (1986) (McKay, Arb.).

58. The arbitrator recognized at least two possible reasons for requiring surveillance: to prevent dilution of the sample with water or other substances and to prevent the substitution of a "clean" sample in place of the grievant's sample. Although the arbitrator did not find that observation was unreasonable per se, he did recognize the procedure to be highly invasive and embarrassing. *Id.* at 3289.

59. *Id.* at 3289-90. *But cf.* *Jim Walter Resources v. United Mine Workers of Am., Local, 2245*, 88 Lab. Arb. (BNA) 1254 (1987) (Nicholas, Arb.) (employer properly discharged two employees who failed to produce urine specimens). Although the employees in *Jim Walter* alleged that they suffered from "bashful kidney syndrome," and thus could

Not only will arbitrators find a testing policy to be unreasonable when it unduly invades the privacy of employees tested, but a testing policy may be found unreasonable for other reasons as well. In *Young Insulation Group of Memphis, Inc. v. International Association of Heat & Frost and Asbestos Workers*,⁶⁰ Arbitrator Boals found discharge improper where an employee tested positive for marijuana use but at such low levels that discharge was not justified.⁶¹ The arbitrator found the employer's "cut-off level" to be unreasonably low, especially in comparison to higher cut-off levels in other testing programs such as those in the federal government. Moreover, such a low cut-off level could not discount passive inhalation as a cause of the positive result. Thus, the arbitrator held the employer's testing rule to be unreasonable.⁶²

Arbitrators have also required that employers demonstrate a "nexus" between the employee's drug abuse and the employer's business interests.⁶³ Disciplinary action will usually be upheld when it is shown that the worker was under the influence of drugs while on the job or that off-the-job abuse had altered on-the-job performance. Thus, in *South Carolina Electric & Gas Co. v. Amalgamated Transit Union, Local 1337*,⁶⁴ an arbitrator concluded that off-duty use was highly relevant in the case of a bus driver. The arbitrator stated:

Mounting scientific evidence indicates that chronic use of pot, of course varying with intensity and length of use, has a deleterious and lingering effect on physical dexterity and mental acuity. Since it is impossible to test for when the substance is ingested or the intensity or duration of usage, it is reasonable to ban an employee's use altogether.⁶⁵

A similar result was reached in *Texas City Refinery, Inc. v. International Brotherhood of Electrical Workers, Local 527*,⁶⁶ where Arbitrator Milentz upheld the discharge of an oil refinery employee who had failed a drug test for the second time. In rejecting the union's

not produce a urine specimen, the arbitrator found they were given sufficient time and opportunity to comply. *Id.* at 1256.

60. 90 Lab. Arb. (BNA) 341 (1987) (Boals, Arb.).

61. *Id.* at 345.

62. Other factors influenced this arbitrator in this case. Of great significance, though not discussed directly was grievant's reputation as an "agitator" which may have made her employer eager to discharge her. *Id.*

63. Susser, *supra* note 3, at 52; Denenberg & Denenberg, *supra* note 1, at 25. See, e.g., *Young Insulation Group v. International Ass'n of Heat & Frost and Asbestos Workers*, 90 Lab. Arb. (BNA) 341, 346 (1987) (Boals, Arb.) ("It should be noted that many arbitrators take the position that nexus with work or employer interests must also be present along with evidence of alcohol or other substance symptoms.").

64. 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.).

65. *Id.* at 849. See also *Marathon Petroleum Co. v. Oil, Chem. and Atomic Workers Int'l Union, Local 4-449*, 89 Lab. Arb. (BNA) 717, 721 (1987) (Grimes, Arb.) (although some arbitrators believe that what an employee does on his own time is his own business, there are exceptions where off-duty conduct must be regulated to meet legitimate interests of the employer).

66. 89 Lab. Arb. (BNA) 1159 (1987) (Milentz, Arb.).

argument that management had not established a connection between off-duty behavior and on-the-job impairment, the arbitrator stated: "Notwithstanding the Union 'correlation' argument, the presence of drugs on the job must be recognized as a potential cause for serious emergency and cannot be ignored. Therefore, this type of off-the-job behavior is *not beyond the control of the company.*"⁶⁷

The results in *South Carolina Electric & Gas* and *Texas City Refinery* are largely explicable on the grounds that the grievants were employed in occupations which affected the public's safety or involved hazardous activities. In less dangerous occupations, however, arbitrators have often been skeptical of testing programs which fail to appreciate the distinction between on and off-the-job conduct. Typically, arbitrators have regarded off-duty misconduct, including criminal behavior, as beyond the reach of employer discipline. According to one commentator, there is a "widely accepted principle of arbitral law" that employers have no business being concerned with what an employee does on his or her own time.⁶⁸ In *Texas Utilities Generating Company v. International Brotherhood of Electrical Workers, Local 2337*,⁶⁹ for example, Arbitrator Edes reinstated a worker who resigned rather than take a drug test. Although the worker had been accused of smoking marijuana on company premises while he was off-duty, the arbitrator held that the company could not demand a drug test because the worker's presence on company premises was not related to his work.⁷⁰

The nexus requirement can cause special problems for employers with respect to drug testing because urinalysis testing probes drug use during periods when the employee is off-duty.⁷¹ A positive test result

67. *Id.* at 1163.

68. Geidt, *supra* note 44, at 195. This principle was best demonstrated in *John Morrell & Co. v. United Food & Commercial Workers, Local 115*, 90 Lab. Arb. (BNA) 38 (1987) (Concepcion, Arb.), where the arbitrator found discharge improper where an employee was dismissed after he was convicted of possession of narcotics for sale. According to this arbitrator, the employer's rule prohibiting illegal possession of narcotics did not extend to the employee's home and the employer failed to establish a nexus between illicit off-duty conduct and ability to perform his job. *Id.* at 40.

69. 84-1 Lab. Arb. Awards (CCH) ¶ 8025 (1983) (Edes, Arb.).

70. *Id.* But see *Union Oil of California v. Teamsters Local 980*, 87 Lab. Arb. (BNA) 297 (1985) (Boner, Arb.) (employer properly suspended grievant for testing positive despite fact that positive result did not show illegal substances were used on the job); *Indianapolis Power & Light Co. v. International Bhd. of Elec. Workers, Local 1395*, 85-2 Lab. Arb. Awards (CCH) ¶ 8507 (1986) (Volz, Arb.) (discharge upheld despite argument that employee had not used drugs while on company time); *Marathon Petroleum Co. v. Oil, Chem. and Atomic Workers Int'l Union, Local 4-449*, 89 Lab. Arb. (BNA) 717, 722 (1987) (Grimes, Arb.) ("Impairment and off-duty regulation of an employee's activities are not, however, the central or controlling issues in this case. . . . The Union's remedy on these issues lies in the collective bargaining process and the Working Agreement.").

71. *Denenberg & Denenberg, supra* note 1, at 26; *Cross & Haney, supra* note 1, at 533-34. See *Boone Energy v. United Mine Workers of Am., Dist. 17, Local 1696*, 85 Lab. Arb. (BNA) 233 (1985) (O'Connell, Arb.) (employees improperly discharged because

merely establishes that drug use occurred sometime in the past. In this respect, employers may have a difficult time proving that its business interests were adversely affected by the employee's drug use. In *Georgia-Pacific Corp. v. United Paperworkers International Union, Local 335*,⁷² Arbitrator Clarke ruled that an employee was improperly discharged after testing positive following an accident on company premises. The basis for his conclusion was that the positive test result was insufficient evidence to conclude that the grievant was under the influence at the time the accident occurred.⁷³ While few can doubt the legitimacy of management's concern over drug use in the workplace, a similar interest concerning drug use away from work is less tenable in most instances.⁷⁴

Arbitrators have also expressed concern over the accuracy of drug test and the need for following up with confirmatory tests when the initial test result is positive.⁷⁵ Unions have frequently challenged whether tests have been performed adequately and whether a positive result indeed establishes that a worker was under the influence of drugs.⁷⁶ Because drug testing is not one hundred percent accurate,⁷⁷ arbitrators

positive test results merely indicated past use of drugs and did not demonstrate that employees were under the influence while on the job or when tests were taken; *Regional Transp. Dist. v. Amalgamated Transit Union, Local 1001*, 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.) ("The central problem in this dispute is the inability of current scientific tests to conclusively prove that an individual is in fact impaired or under the influence of marijuana. . . .").

72. 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (1985) (Clarke, Arb.).

73. The arbitrator concluded, "[T]here is lacking in the present case competent evidence which would provide a basis for the Arbitrator's inferring from the . . . test results that the Grievant was under the influence of marijuana while at work on the night [the accident occurred]. *Id.* A similar result was reached in *CFS Continental, Inc. v. Teamsters Local Union No. 117*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumbley, Arb.). In that case, discipline was overturned because the grievant's drug test failed to distinguish between on-the-job use and off-the-job use of marijuana. In *Bowman Trans., Inc. v. United Steelworkers of Am.*, Local 13600, 90 Lab. Arb. (BNA) 347, 349 (1987) (Duff, Arb.), the arbitrator wrote, "The evidence indicating that THC was in [the grievant's] system while he worked simply does not by itself prove that he violated [the company drug rule]." See also *Phoenix Transit Sys. v. Amalgamated Transit Union, Local 1433*, 889 Lab. Arb. (BNA) 973, 978-79 (1987) (Speroff, Arb.) (bus driver improperly discharged after testing positive for marijuana largely because test results could not establish correlation between drug use and work).

74. See Denenberg & Denenberg, *supra* note 1, at 25-26. At least one arbitrator has distinguished situations in which the collective bargaining agreement specifically states that a positive test result requires a finding of impairment and situations where the agreement says nothing on the issue. In the former situation, the employer will have satisfied the nexus requirement since a positive result is the equivalent of impairment on the job. See *Regional Transp. Dist. v. Amalgamated Transit Union, Local 1001*, 91 Lab. Arb. (BNA) 213, 219 (1988) (Goldstein, Arb.). It may be wise, therefore, if employers structure their testing programs so that a positive result, rather than "impairment," is the basis for disciplinary action.

75. Denenberg & Denenberg, *supra* note 1, at 26.

76. See *Georgia-Pacific Corp. v. United Paperworkers Int'l Union, Local 335*, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (1985) (Clarke, Arb.).

77. There is much disagreement on how reliable drug testing is and what degree of certainty is needed to justify discipline based upon positive results. While a discussion of

have been reluctant to uphold disciplinary action that is not bolstered by more thorough and reliable testing which confirms the initial result.⁷⁸

The accuracy of drug testing has been questioned by several arbitrators. In *Phoenix Transit System v. Amalgamated Transit Union, Local 1433*,⁷⁹ Arbitrator Speroff determined that a bus driver was improperly discharged largely because testing procedures and testing reliability raised questions as to the authenticity of the test results.⁸⁰ Yet, most arbitrators accept the reliability of drug testing when precautions are taken to avoid spurious results. In *Metropolitan Transit Authority, Houston v. Transport Workers Union of America, Local 260*,⁸¹ for example, the arbitrator found test results were reliable because, among other things, more than one laboratory was used, confirmatory tests were conducted, and grievant was tested within four hours of the "incident."⁸²

Moreover, the mere possibility of error or the existence of minor errors in the testing process will not be enough to render the test results unreliable. In *Regional Transportation District v. Amalgamated Transit Union, Local 1001*,⁸³ Arbitrator Goldstein found that the testing laboratory made an error as to the entry of the date when a urine specimen was taken. Additionally, the union argued drug testing was inherently unreliable. The arbitrator rejected both arguments as a reason for setting aside disciplinary action. He observed:

The mere possibility of error, and the fact of the minor error on the entry of a particular date on the form used to record the test results, given the state of art presently existing, cannot impugn the entire process.⁸⁴

Arbitrators have also been adamant in requiring various procedural safeguards in the testing process. Thus, employers must be prepared to

the different testing methods and the debate over the accuracy of drug testing are beyond the scope of this Note, the following sources should prove helpful: Denenberg & Denenberg, *supra* note 1, at 28; Note, *Jar Wars: Drug Testing in the Workplace*, 23 WILLAMETTE L. REV. 529, 540-48 (1987); Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 NOVA L. REV. 415 (1987).

78. Denenberg & Denenberg, *supra* note 1, at 21-22; Rust, *supra* note 2, at 51-52. Cf. *Regional Transp. Dist. v. Amalgamated Transit Union, Local 1001*, 91 Lab. Arb. (BNA) 213, 218-19 (1988) (Goldstein, Arb.) (the mere existence of the possibility of error cannot impugn the entire process).

79. 89 Lab. Arb. (BNA) 973 (1987) (Speroff, Arb.).

80. See also *Georgia-Pacific Corp. v. United Paperworkers Int'l Union, Local 335*, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (Clarke, Arb.).

81. 89 Lab. Arb. (BNA) 129 (1987) (Baroni, Arb.).

82. The arbitrator found that "the Authority's drug screen policy is designed to insure that every reasonable effort is made to avoid the possibility of a false positive. State-of-the-art testing techniques are utilized. . . ." *Id.* at 132. See also *South Carolina Elec. & Gas Co. v. Amalgamated Transit Union, Local 1337*, 89 Lab. Arb. (BNA) 845, 849 (1987) (Boals, Arb.); *Marathon Petroleum Co. v. Oil, Chem. & Atomic Workers Int'l Union, Local 4-449*, 89 Lab. Arb. 717 (1987) (Grimes, Arb.).

83. 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.).

84. *Id.* at 218.

show a "chain of custody."⁸⁵ That is, the urine sample must be properly labelled and then transported and stored at a testing facility. Without such safeguards, there is no guarantee that the specimen belonged to the accused or that it was not tainted. Without a showing of a proper chain of custody, a testing program may be vulnerable to challenges brought by a grievant who was disciplined on the basis of the testing result.⁸⁶ In *Young Insulation Group v. International Association of Heat & Frost and Asbestos Insulators*,⁸⁷ the arbitrator expressed serious doubts that the drug test was reliable, in large part, because the company could not demonstrate continuity in documenting the chain of custody, especially since the grievant vehemently denied any drug use at all and the test result indicated a negligible presence of THC.⁸⁸

A final issue which arbitrators have considered is whether termination is the appropriate action for employees who test positive. Generally, termination for drug use will be upheld where a collective bargaining agreement expressly forbids such conduct on company premises.⁸⁹ In a number of cases, however, arbitrators have overturned termination where the employer has a drug and alcohol rehabilitation program.⁹⁰ Arbitrators are often reluctant to uphold termination for drug use because they believe it is too severe for something which they regard as a treatable illness.⁹¹ What is more, collective bargaining agreements frequently require that disciplined employees enroll in an Employee Assistance Program (EAP). If management circumvents such a provision by summarily discharging workers without allowing them to enroll, the arbitrator may find a violation of the contract.⁹²

85. Denenberg & Denenberg, *supra* note 1, at 29-30. Mere speculation by the union that the sample was contaminated or mixed up with another sample will generally not be enough to show lack of a proper chain of custody. See, e.g., *Koppers Co., Inc. v. United Steelworkers of Am., Local 14436*, 91 Lab. Arb. (BNA) 363, 365 (1988) (Yarowsky, Arb.).

86. *Id.* See *Georgia-Pacific Corp. v. United Paperworkers Int'l Union, Local 335*, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (1985) (Clarke, Arb.). *Phoenix Transit Sys. v. Amalgamated Transit Union, Local 1433*, 89 Lab. Arb. (BNA) 973 (1987) (Speroff, Arb.).

87. 90 Lab. Arb. (BNA) 341 (1987) (Boals, Arb.).

88. *Id.* at 346.

89. Susser, *supra* note 3, at 52. But see *infra* text accompanying notes 134-37.

90. Rust, *supra* note 2, at 53-54; Cross & Haney, *supra* note 1, at 535; Geidt, *supra* note 44, at 197-98. But cf. *Herlitz, Inc. v. United Paperworkers Int'l Union*, 89 Lab. Arb. (BNA) 436, 441 (1987) (Allen, Arb.) (where employee was under the influence of drugs while operating a fork-lift, dismissal was proper despite company's plans to implement an employee assistance program).

91. See Geidt, *supra* note 44, at 197-98; *Southern Cal. Gas Co. v. Utility Workers of Am., Local 132*, 89 Lab. Arb. (BNA) 393, 396-98 (1987) (Alleyne, Arb.).

92. In *South Carolina Elec. & Gas Co. v. Amalgamated Transit Union, Local 1337*, 89 Lab. Arb. (BNA) 845, 849 (1987) (Boals, Arb.), the arbitrator reduced discharge to disciplinary lay-off because the employer failed to refer the grievant to an EAP and thus abrogated the company's own testing guidelines. See also *ITT Barton Instruments Co.*, 89 Lab. Arb. (BNA) 1196, 1200 (1987) (Draznin, Arb.); *Boise Cascade Corp. v. Southern Council of Indus. Workers*, 90 Lab. Arb. (BNA) 791, 794-95 (1988) (Nicholas, Arb.).

A review of drug testing arbitration awards, therefore, reveals that a number of factors can substantially limit an employer's ability to implement a drug testing program in the unionized workplace. Employers who possess the right to test workers should be aware of these limitations. While these restrictions apply to situations in which the collective bargaining agreement permits at least some form of testing, an additional limitation will arise where the collective bargaining agreement is silent on the issue of drug testing. In such cases, the employer may be prohibited from drug testing until it bargains first with the union. The next section will address this issue.

III. DRUG TESTING: WHERE THE COLLECTIVE BARGAINING AGREEMENT IS SILENT

In most instances, labor and management will have discussed the issue of drug testing in their contract negotiations, and the topic will be addressed in the labor contract. In some situations, however, employers will attempt to implement a testing program without first engaging in good faith bargaining with the union. Where the collective bargaining agreement is silent, the issue is apt to be whether management can act unilaterally in testing its employees. A union which wishes to challenge an employer's unilateral implementation of a testing program can do so through two channels: the union can file an unfair labor practice charge with the National Labor Relations Board (NLRB) or it can file a grievance under the collective bargaining agreement. In the former case, the union will argue that unilateral implementation constitutes a violation of the National Labor Relations Act (NLRA)⁹³ in the latter case the union will allege that the testing program violates the collective bargaining agreement.⁹⁴ In both instances, an arbitrator will likely decide the issue. Most collective bargaining agreements specify that disputes

93. 29 U.S.C. §§ 151-187 (1985). According to sections 8(a)(5) and 8(d) of the NLRA, the employer and the union have a mutual obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Issues which come within the meaning of this phrase are considered "mandatory subjects of bargaining." The significance of this phrase is that an employer can not unilaterally implement changes that are covered by the above phrase; to do so would constitute an unfair labor practice. *See* NLRB v. Katz, 369 U.S. 736 (1962). The NLRB has yet to decide the issue of whether drug testing falls within the scope of mandatory bargaining subjects. However, the arguments are very strong that it is indeed a mandatory bargaining subject. This conclusion is supported by relevant U.S. Supreme Court decisions, analogous rulings by the NLRB, and by a recent memorandum issued by the General Counsel to the NLRB. *See generally* Office of the General Counsel, *NLRB General Counsel's Memorandum on Drug and Alcohol Testing*, Daily Lab. R., Sept. 24, 1987, at D-1 [hereinafter *General Counsel Memorandum*].

94. *See, e.g.*, Laidlaw Transit, 89 Lab. Arb. (BNA) 1001 (1987) (Allen, Arb.) (where the arbitrator was faced with both the issue of an unfair labor practice charge and the issue of whether the company violated the labor contract).

will be submitted to arbitration, and although unfair labor practice charges are generally handled by the NLRB, the Board has a policy of deferring such disputes to arbitration whenever the collective bargaining agreement provides for it.⁹⁵

In deciding whether an employer may unilaterally test employees, arbitrators will generally focus upon the express language of the collective bargaining agreement. Often, the key issue will be whether a management rights clause or a broadly phrased work rule give the employer the right to test.⁹⁶ Additional factors that arbitrators consider include the history of contract negotiations between the parties and past practices in which the union has allowed the employer to make unilateral changes in rules which affect working conditions.⁹⁷

Arbitrators are greatly divided on the issue of whether a management rights clause⁹⁸ constitutes a union's waiver of its right to bargain over the issue of testing. In *Sanford Corp. v. International Brotherhood of Teamsters, Local 745*,⁹⁹ Arbitrator Weis found that because management had a contractual right to direct its workforce and an obligation to maintain a safe workplace, it could unilaterally implement testing. The arbitrator concluded that a management rights clause coupled with "the absence of any mention of drug testing in the Agreement compel a conclusion that the Employer possess [sic] the right to require employees to demonstrate fitness to perform their job functions."¹⁰⁰ The arbitrator added, "The Company has the inherent right to direct its working forces and the contractual duty to provide a healthy, safe, and efficient place in which employees work."¹⁰¹

Similarly, in *Bay Area Rapid Transit v. Amalgamated Transit Union*,¹⁰² Arbitrator Concepcion found that an employer had the right to implement testing unilaterally because of certain provisions in its collective bargaining agreement which gave it "the right to promulgate and implement reasonable rules and regulations."¹⁰³ And in *Boise Cascade Corp.*,¹⁰⁴ the arbitrator found no violation of the collective bargaining agreement where management reserved the right to test under a contract provision which allowed it to "establish reasonable plant rules and regulations not in conflict with [the] Agreement."¹⁰⁵

95. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). See generally R. GORMAN, *supra* note 11, at 751-65.

96. Morikawa, *supra* note 10, at 664-65.

97. Cross & Haney, *supra* note 1, at 524.

98. See R. GORMAN, *supra* note 11, at 469.

99. 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.).

100. *Id.* at 972.

101. *Id.* at 973.

102. 87-1 Lab. Arb. Awards (CCH) ¶ 8084 (1986) (Concepcion, Arb.).

103. *Id.*

104. 90 Lab. Arb. (BNA) 791 (1987) (Nicholas, Arb.).

105. *Id.* at 793-94. See also Maple Meadow Mining, 90 Lab. Arb. (BNA) 873, 876-78, (1987) (Phelan, Arb.).

Yet, Arbitrator Warns reached an opposite conclusion in *Gem City Chemicals, Inc. v. International Brotherhood of Teamsters, Local 957*.¹⁰⁶ In that case, the arbitrator rejected management's argument that it was "within their prerogative to institute . . . testing under the Management Rights clause."¹⁰⁷ Management argued that its right to conduct random testing was based upon a work rule included in the labor contract which prohibited "intoxication . . . or use of illegal drugs on the job." The arbitrator noted that although this work rule gave the employer the right to require drug testing, it did not give the employer the right to do so on a random basis; the workers had to have notice.¹⁰⁸

A few arbitrators have ruled that a provision which requires employees to submit to physical examinations also gives the employer the right to test for drugs.¹⁰⁹ However, the weight of authority is clearly to the contrary.¹¹⁰ In *Gem City Chemicals*¹¹¹ for example, the arbitrator rejected the company's contention that a provision calling for a physical examination enabled the company to administer drug tests. The arbitrator's decision was based largely upon the fact that the union had requested during negotiation that the physical examinations be given in order to protect workers from the effects of handling toxic waste, a purpose unrelated to the employer's desire to eliminate drug abuse among its workers.¹¹²

Additionally, a company rule against use or possession of drugs on company premises will generally not provide a basis for implementing a drug testing program.¹¹³ Nor will a previous agreement to permit a limited form of testing be deemed to permit the right to engage in more expansive testing.¹¹⁴ A recent example from the world of sports is illustrative of this latter point. In response to the widespread publicity surrounding the problem of drug abuse in professional sports, the owners of eight National Football League teams decided to implement man-

106. 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).

107. *Id.* at 1025.

108. *Id.* See also *Philips Indus.*, 90 Lab. Arb. (BNA) 222 (1988) (DiLeone, Arb.) ("Whenever there is an implementation of a program which is not expressly provided for in the agreement, and it directly affects the conditions of employment, one cannot go so far as to conclude that Management can superimpose certain conditions of employment under a plant rules clause or a Management rights clause without union participation.").

109. See, e.g., *American Standard v. International Bhd. of Teamsters, Local 651*, 82-1 Lab. Arb. Awards (CCH) ¶ 8090 (1981) (Katz, Arb.) (provision in collective bargaining agreement gave company the right to require a medical examination at any time to determine the employee's fitness for employment); *Sanford Corp. v. International Bhd. of Teamsters*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.).

110. See, e.g., *General Counsel Memorandum*, *supra* note 93, at D-1.

111. 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).

112. *Id.* at 1024.

113. *General Counsel Memorandum*, *supra* note 93, at D-1.

114. See *Denenberg & Denenberg*, *supra* note 1, at 20.

datory, post-season testing following the 1985 season. Under this plan, some players refused to take the tests and were fined.¹¹⁵

The NFL Players Association challenged these testing programs by filing an unfair labor practice charge against the team owners and the League. Because the collective bargaining agreement permitted only pre-season and reasonable cause testing, the players' union argued that the eight team owners had violated the agreement.¹¹⁶ The dispute was eventually submitted to an arbitrator who found for the union. The arbitrator concluded that the players and the owners had bargained over the subject of drug testing, and the collective bargaining agreement had specifically established the permissible boundaries of such testing. By implementing post-season testing, the owners had exceeded those boundaries.¹¹⁷

IV. THE ADVANTAGES OF ARBITRATION IN DRUG TESTING DISPUTES

Arbitration can be an ideal way of resolving labor disputes over drug testing programs. This is, in part, a function of the inherent effectiveness of arbitration as a means of resolving disputes, especially in a labor setting.¹¹⁸ While not all labor disputes lend themselves to arbitration,¹¹⁹ it is nevertheless true that arbitration is effective in that it is expedient and relatively inexpensive. Arbitration can define problem areas, explore alternatives, and prevent repetition of incidents giving rise to grievances. Finally, arbitration can also be an effective policy making tool.¹²⁰

In the realm of drug testing disputes, arbitration is especially effective. It is helpful from the standpoint of workers because it can offer them protection from overzealous or unfair testing practices which could not be challenged otherwise. Since private employers are generally not state actors, and are thus exempt from the constraints of the Constitution, they have greater freedom in implementing drug testing.¹²¹ Contesting a particular onerous program before an arbitrator may offer the only protection available.

The value of arbitration in this respect is best illustrated by the arbitration case of *Gem Industrial Contractors Co. v. Mill-Wrights and Machine Erectors, Local 1393*.¹²² In that case, a contractor which was

115. Lock, *The Legality Under the National Labor Relations Act of Attempts by the National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 10 (1987).

116. *Id.* at 11.

117. *Id.* at 14-15.

118. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 7-12 (4th ed. 1985).

119. *Id.* at 96.

120. *Id.* at 7-12. R. GORMAN, *supra* note 11, at 541-43.

121. See *supra* notes 6-7.

122. 89 Lab. Arb. (BNA) 1087 (1987) (Wolk, Arb.).

engaged in construction at a nuclear power plant discharged an employee who was unable to provide a urine sample required by the plant's operator. The grievant maintained that he suffered from "bashful kidney" phobia and, despite multiple attempts, could not pass water in the presence of others. In order to comply with the plant's drug-free work policy, the grievant offered to take a blood test instead, but this request was denied by the people conducting the test.¹²³ In reinstating the grievant with back pay, Arbitrator Wolk stated:

In my view the goals of [the plant operator] in this respect were completely appropriate but the end does not justify the means employed particularly as applied to the grievant in this case. The testers were part of a firm which had undertaken a contract with [the plant operator]. The apathetic attitude of the tester with respect to the grievant's problems was indicative of a failure on the part of the testing company to have given full consideration to the reasonable rights of those being tested¹²⁴

Thus, it is clear from cases such as this one that arbitration can be highly effective in preventing injustices which may arise out of ill-conceived or improperly implemented testing programs.

A review of recent arbitration cases dealing with drug testing reveals that arbitration is effective in accommodating the interests of management as well as labor. Arbitrators have been quick to recognize the strength of an employer's interest in making the workplace drug-free, especially where plant safety is affected.¹²⁵ Moreover, cases in which arbitrators openly question the accuracy or propriety of drug testing programs, while frequent in the early 1980s,¹²⁶ have now become the exception rather than the norm.¹²⁷ In many ways, the increasing acceptance of reasonable drug testing as a means of eradicating drug

123. *Id.* at 1088.

124. *Id.* at 1089. In reaching its decision, the arbitrator found that employers have a duty to investigate the testing practices of the testing laboratory and inquire into the results of tests, especially in circumstances like those surrounding grievant's test. *See also* Southeastern Pa. Transp. Auth. v. Transport Workers Union of Philadelphia, Local 234, 89 Lab. Arb. (BNA) (1987) (DiLauro, Arb.) (authority had reasonable cause to test grievant (who ultimately tested positive), but testing procedures embarrassed and humiliated her, and thus employer should exercise greater caution). *But cf.* Jim Walter Resources, 88 Lab. Arb. (BNA) 1255 (1987) (Nicholas, Arb.) (employer properly discharged two employees who failed to provide urine samples despite their contention that they suffered from "bashful kidney syndrome.").

125. In *Bowman Transp.*, 90 Lab. Arb. (BNA) 347 (1987), for example, Arbitrator Duff noted that an employer has a right to not only be concerned about the effects of drug abuse on safety but also about how it impacts on the employer's potential tort liability.

126. *See* Geidt, *supra* note 44, at 193-98.

127. An examination of recent published arbitration awards reveals that while arbitrators continue to reduce disciplinary sanctions, few question the validity or accuracy of drug testing. *See, e.g.*, Regional Transp. Dist., 91 Lab. Arb. (BNA) 213, 218-19 (1988) (Goldstein, Arb.).

abuse from the workplace parallels the same development in the nation's courts.¹²⁸

Arbitration in drug testing disputes is not without its drawbacks, however. While arbitration may protect workers from poorly devised testing plans, the protections available are in no way comparable to constitutional protections afforded public sector employees.¹²⁹ Moreover, arbitration tends to be unpredictable, as arbitrators are not strictly bound by precedent or principles of law.¹³⁰ When dealing with a controversial subject like drug testing, arbitrators' opinions are likely to be as diverse as those of the general public, and the flexibility of arbitration may afford arbitrators the opportunity to inject those opinions into their awards.

The possibility that some arbitrators may object to drug testing in principle and therefore inject their personal views into their decisions may make employers less enthusiastic about arbitration than employees and their unions. This may be especially true in light of the tendency of some arbitrators to set aside discipline based upon testing results.¹³¹ According to one commentator, a "striking fact" about arbitration decisions involving discharge is that arbitrators have overturned more drug-related discharges than they have sustained.¹³² In fact, in one arbitration case, the arbitrator observed that between 1973 and 1982, arbitrators set aside nearly two-thirds of all discharges involving use or possession of drugs by workers.¹³³

Although there has been an increasing tendency in recent years for arbitrators to enforce drug testing policies, some still refuse to uphold disciplinary action based upon positive drug test results. A few arbitrators have manifested a belief that dismissal is too harsh a penalty, and thus they are reluctant to impose what they view as the "industrial equivalent of capital punishment." This reluctance is enhanced when Employee Assistance Programs are available as an alternative to discharge.¹³⁴ Other arbitrators have perhaps insisted upon an unreasonably close connection between an employee's proven drug use and his performance on the job.¹³⁵ Finally, in some cases, arbitrators have interpreted a collective

128. See Cox, *supra* note 2, at 3. Cf. Denenberg & Denenberg, *supra* note 1, at 20.

129. See Joseph, *supra* note 6, at 641 n.114; see, e.g., McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

130. Imwinkelried, *supra* note 14, at 577.

131. See Geidt, *supra* note 44, at 193.

132. *Id.* at 193. A review of recent arbitration awards dealing with discharges, however, discloses that this may no longer be true.

133. Mallinckrodt, Inc., 80 Lab. Arb. (BNA) 1261, 1265 (1983) (Seidman, Arb.).

134. See generally Note, *supra* note 77, at 548-52.

135. Geidt, *supra* note 44, at 193. See, e.g., Southern Cal. Gas Co., 89 Lab. Arb. (BNA) 393 (1987) (Alleyne, Arb.).

bargaining agreement in such a way that it defeats the purpose of a testing program.¹³⁶

The reluctance of some arbitrators to uphold discharges based upon positive test results should cause concern for management. Often, an arbitrator will ignore obvious facts and clear workplace rules in order to reinstate a discharged worker.¹³⁷ At one time, it appeared that employers could possibly find relief in the courts in cases where the arbitral award unreasonably fails to enforce company rules against drug abuse in the workplace. In *MISCO v. United Paperworkers International Union*,¹³⁸ for example, the Fifth Circuit overturned an arbitrator's award which reinstated an employee who had been terminated after being found with marijuana on company premises. Although the grievant was in clear violation of company rules against bringing controlled substances on plant premises, the arbitrator ordered his reinstatement with full back pay.¹³⁹ The court vacated the award and concluded, "Such an award overrides the employer's attempt to protect the safety of its employees, including [grievant], in the name of safeguarding [grievant's] abstract procedural rights against a determination by the employer that the arbitrator knew was in fact true: that [grievant] *did* bring marijuana onto his employer's premises."¹⁴⁰

The ability of employers to turn to the courts, however, has been greatly circumscribed in light of a recent United States Supreme Court

136. In *Warehouse Distribution Centers*, 90 Lab. Arb. (BNA) 979 (1987) (Weiss, Arb.), the arbitrator found discharge improper where grievant refused to submit to testing after he was spotted smoking marijuana on his lunch hour. Although the arbitrator found that the employer had reasonable grounds to test grievant, he nonetheless reduced discharge to a written warning because refusal to submit to testing was not tantamount to "gross misconduct" and employees could only be discharged for gross misconduct. Apparently, the arbitrator did not appreciate the irony that if grievant had taken the drug test and tested positive, he would have been discharged, but since he refused, he would receive only a written warning.

137. See, e.g., *Kroger Co. v. Bakery, Confectionary & Tobacco Workers Int'l Union, Local 372-A*, 86-2 Lab. Arb. Awards (CCH) ¶ 8407 (1986) (Wren, Arb.). In *Kroger Co.*, the grievant tested positive after his supervisors suspected he was under the influence of drugs. According to one supervisor, grievant was loafing and pushing a cart in the wrong direction. Grievant also appeared very nervous and his eyes were "glassy." Despite overwhelming evidence that the grievant was under the influence and unable to perform his job, Arbitrator Wren concluded that while the company proved that grievant had used cocaine on the morning in question, it failed to show that grievant's work was affected or that he posed any risk of harm to his fellow workers. *Id.* The result in *Kroger Co.* was clearly based upon the arbitrator's personal belief that discharge was inappropriate. The arbitrator wrote, "It is one thing for the Company to prove that Grievant used cocaine on one occasion. It is quite a different matter to determine whether discharge was the appropriate remedy." *Id.* at 4734.

138. 768 F.2d 739 (5th Cir. 1985), *rev'd*, 108 S. Ct. 364 (1987).

139. *Id.* at 739-43.

140. *Id.* at 743. See also *Bakers Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350 (6th Cir. 1984) (Sixth Circuit found that arbitrator acted beyond his authority in disregarding the explicit terms of the grievance settlement agreement by reinstating a worker who had violated the terms of last-chance rehabilitation program).

decision which reversed the Fifth Circuit in *MISCO*. In *United Paperworkers International Union v. MISCO*,¹⁴¹ the Court held that the Fifth Circuit had exceeded its authority in reviewing the arbitrator's award. The Court noted that absent fraud or dishonesty, reviewing courts are restrained from considering the merits of the award. According to the Court, limited review of arbitration decisions is in keeping with the federal policy of privately settling labor disputes without governmental intervention. As long as the arbitrator has arguably construed or applied the contract and acted within the scope of his authority, the court cannot overturn the award simply because it disagrees with his findings and interpretation.¹⁴²

Still, employers can take heart in the fact that arbitrators' attitudes on company drug rules are changing. Given the recent heightened awareness of the dangers which drug abuse presents for American society, the reluctance of arbitrators to uphold discipline may be eroding; recent arbitration awards involving drug testing seem to confirm this.¹⁴³

V. CONCLUSION

With the growing popularity of drug testing as a means to ridding the workplace of dangerous drugs, arbitrators have been called upon to decide disputes arising from the implementation of such programs. Because a large number of American workers are represented by a union, the role of arbitrators in delineating the boundaries of permissible testing will not be insignificant. This should be a welcome trend. Arbitration provides a means by which labor and management can develop testing programs which are not only effective in curbing drug abuse, but also protect the rights of the workers tested. What is more, union cooperation is essential if drug testing is to be successful. Employees will generally be more amenable to testing when they know that it has been endorsed by their union and that they enjoy some protection from arbitrary and unreliable testing. Finally, labor and management will send a more persuasive message to the public when they speak out together against substance abuse.

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141. 108 S. Ct. 364 (1987).

142. *Id.* at 370-73.

143. See, e.g., *General Elec. Co.*, 91 Lab. Arb. (BNA) 400 (1988) (Allen, Arb.); *Koppers Co., Inc.*, 91 Lab. Arb. (BNA) 363 (1988) (Yarowsky, Arb.); *Regional Transp. Dist.*, 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.); *South Carolina Elec. & Gas Co. v. Amalgamated Transit Union, Local 1337*, 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.); *Marathon Petroleum Co. v. Oil, Chem. & Atomic Workers Int'l Union, Local 4-449*, 89 Lab. Arb. (BNA) 129 (1987) (Baroni, Arb.).